

4416
04190
DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-187724

DATE: November 10, 1977

MATTER OF: Electrical Constructors of America, Inc.

DIGEST:

Where State law is unclear on close questions raised in complaint regarding procedures followed by grantee in awarding contract under grant conditions which indicate that State law shall govern procurement, GAO will not superimpose its interpretation of State law and, accordingly, finds no basis to object to award and concurrence therein by Federal grantor.

Electrical Constructors of America, Inc. (El-Con), requests that GAO review the award of a contract by the city of Orlando, Florida, under a grant awarded by the Federal Aviation Administration of the Department of Transportation (FAA) pursuant to the Airport and Airway Development Act of 1970, 49 U.S.C. §§ 1701-1742 (1970), as amended by the Airport and Airway Development Act Amendments of 1976, Pub. L. No. 94-353, 90 Stat. 871, and implementing regulations at 14 C.F.R. part 152 (1976). The \$2.6 million grant provides funds for approximately 75 percent of the expansion and upgrading of the Orlando Jetport. The contract in question involves the installation of in-pavement airport lighting, the approximate cost of which is \$.5 million.

The Greater Orlando Aviation Authority (Authority) solicited bids for the project. Bids were opened on September 16, 1976. Hubbard Construction Company (Hubbard), a general contractor, submitted the lowest bid at \$508,856.25. El-Con, an electrical contractor, submitted the next lowest bid at \$526,849. Three other bids from electrical contractors were also submitted.

On September 16, 1976, El-Con filed a protest with the city of Orlando against the award of any contract to Hubbard. El-Con based its protest on the grounds that Hubbard's bid was nonresponsive, alleging that Hubbard had not complied with the bidding requirements, and that any award to Hubbard would violate the laws and regulations governing the contract because Hubbard intended to subcontract the required electrical work to a firm

B-187724

that had not met the prequalification requirements. By letters dated September 17 and 24, 1976, the Central Florida Chapter, Inc. of the National Electrical Contractors Association and the Florida Association of Electrical Contractors also protested the handling of the bidding on substantially the same bases advanced by El-Con.

On October 25, 1976, El-Con submitted to the Authority a position paper as follows:

"1. That Hubbard was not entitled under Federal Aviation Administration Regulations or Florida law to submit its bid and that an award to Hubbard of the contract would be invalid under said regulations and law.

"2. That Hubbard failed to comply with the explicit terms of the invitation for bids, rendering Hubbard's bid nonresponsive and requiring its rejection.

"3. That Hubbard does not itself perform and has no person currently in its employ qualified to perform the complexity and magnitude of electrical work called for by the subject contract and that Hubbard's named electrical subcontractor has not met the minimum mandatory requirements of Florida law and of the invitation for bids to qualify for the performance of the contract work.

"4. That El-Con, as the lowest responsive responsible bidder, is entitled to the award of the prime contract.

"5. That the critical nature of airport runway lighting demands an especially high level of electrical expertise to insure absolutely reliable installation and to safeguard the public."

El-Con submitted a supplementary memorandum to the Authority on October 29, 1976, which further elaborated its position.

B-187724

On November 2, 1976, the Authority held proceedings on the matter and awarded the contract to Hubbard, subject to the concurrence by the Orlando City Council. El-Con immediately protested the award to FAA and supplemented a prior complaint to this Office filed a day before award.

On November 8, 1976, following the recommendation of the city attorney, the city council approved the award of the contract to Hubbard.

The FAA, by letter dated February 11, 1977, denied El-Con's protest and concurred in the award to Hubbard because (1) the city of Orlando reasonably relied upon its counsel in making the award to Hubbard; (2) the award to Hubbard would not violate part 152 of the FAA Regulations (14 C.F.R. part 152), and (3) the bid prices submitted by Hubbard were reasonable for the work proposed. By letter dated March 29, 1977, El-Con reiterated its complaint here against the award of the contract.

The grant agreement between FAA and the city of Orlando specifies that the airport expansion project is to be carried out in accordance with the Airport and Airway Development Act of 1970, as amended, and the regulations at 14 C.F.R. part 152. The procurement standards set forth at 14 C.F.R. § 152.51(a) and § 152.53(a) require that each contract under the project be awarded through open competitive bidding in compliance with local law.

El-Con claims that Hubbard's bid was illegal because Hubbard is licensed as a general contractor in accordance with part II of chapter 468, Florida statutes (Fla. Stat. Ann. §§ 468.101-468.114 (Supp. 1976)), but not as an electrical contractor under part VII of chapter 468 (Fla. Stat. Ann. §§ 468.180-468.194 (Supp. 1976)). El-Con and Hubbard agree that Hubbard, as a general contractor, could not itself perform the electrical portions of the work since Hubbard is not properly certified or licensed as an electrical contractor (Fla. Stat. Ann. § 468.102(1) (Supp. 1976)), but disagree about the effect of licensure under part II on eligibility to submit a bid for the contract. Whereas El-Con claims that only an electrical contractor licensed under part VII could properly bid this contract, Hubbard maintains that its license as a general contractor entitles it to bid and contract for all types of work, including electrical work, even if it must subcontract the actual performance of the work.

El-Con further claims that Hubbard's bid was illegal and non-responsive because Omega Industries (Omega), the electrical subcontractor Hubbard listed in its bid, was not qualified as an electrical contractor under part VII either at the time bids were submitted or when the contract was awarded. El-Con contends that Greenhut Construction Co. v. Henry A. Knott, Inc., 247 So. 2d 517 (Fla. 1st D.C.A. 1971), required Omega to be qualified to perform the work when Hubbard's bid was submitted and asserts that Omega's lack of qualification at that time rendered Hubbard's bid illegal. El-Con also contends that Hubbard's listing an unqualified subcontractor rendered the bid nonresponsive to the solicitation for bids. El-Con bases this contention on the Instructions to Bidders which required that:

"23. LISTING OF SUB-CONTRACTORS:

"a. All principal subcontractors shall be listed on the Bid Form in the spaces provided, and the name of the person holding the valid appropriate Certificate of Competency together with the number thereof, for the Sub-Contractor's type of work or specialty must be shown.

"c. No change in sub-contractors as listed will be allowed without written permission of the Engineer."

Hubbard, on the other hand, denies the applicability of the Greenhut case, supra, on the basis that in Greenhut, the low bidder (as opposed to a subcontractor) was an out-of-State general contractor which was not licensed and certified in accordance with part II at the time of bid submission while in this instance the low bidder (Hubbard) was licensed and certified at the time of bid submission. The city attorney for Orlando and FAA agree with Hubbard that Greenhut is inapposite because it does not go far enough to cover the present facts.

It is agreed by all parties that Hubbard did not fully respond to paragraph 23 of the Instructions to Bidders, quoted above, because it listed a subcontractor which was not the holder of a Florida Certificate of Competency as an electrical contractor and therefore

B-187724

could not supply a certificate number. However, Hubbard denies that paragraph 23 clearly required the listing of an electrical subcontractor licensed and certified at the time of bid submission as a prerequisite for a valid bid. Hubbard states that, at most, its bid contained a defect as to form which did not destroy the competitive character of the bid and which could be waived by the city under paragraph 14 of the Instructions to Bidders. The referenced paragraph provides:

"14. REJECTION OF IRREGULAR BIDS:

"Bids will be considered irregular and may be rejected if they show omissions, alterations of form, additions not called for, conditions, limitations, unauthorized alternate bids or other irregularities of any kind.

"The City reserves the right to waive any informalities or irregularities of Bids, or to reject any or all bids."

In essence, Hubbard argues that although its bid was irregular and could have been rejected by the city, the irregularity in the bid was one that the city could properly waive since the Instructions to Bidders contained in paragraph 23b a corrective procedure by which substitution of subcontractors could be made.


The role of this Office in reviewing complaints regarding contract award procedures followed by grantees is to foster compliance with grant terms, agency regulations, and applicable statutory requirements. 40 Fed. Reg. 42406 (September 12, 1975).

As stated above, the law of Florida primarily governs the competitive aspects leading to the award of contracts made under this grant. The record reflects uncertainty in the interpretation of the Florida law with respect to the eligibility of general contractors to submit bids on contracts with a substantial amount of electrical work. The Florida statute does not clearly delineate an exclusive sphere of work for which only contractors certified as electrical contractors under part VII of chapter 468 may submit bids. Nor does the Florida law clearly necessitate that a subcontractor be qualified to perform work at the time its name is listed as part of a general contractor's bid submission.

B-187724

These issues are close questions under Florida law. Good arguments were presented by both El-Con and Hubbard. We cannot predict how a Florida court would ultimately interpret the law to determine these questions, since there is apparently no case law specifically addressing these issues. Therefore, in the context of our reviews of grant complaints, we feel it would be inappropriate for this Office to superimpose our interpretation in this uncertain area of law.

Accordingly, we find no basis to object to the award and concurrence therein by the FAA.


Deputy Comptroller General.
of the United States